[ORIGINAL CIVIL JURISDICTION]

CUSSEN, J.

July 22, 1939.

## OTAMCHAND KANJI v. YASSIN BIN SAID.

[NEGRI SEMBILAN CIVIL SUIT No. 10 of 1939]

*Bills of Exchange—promissory note—enforcement of claim on—conflict of laws.*

A promissory note was executed in that part of the Town of Tampin, situated within the border of the Straits Settlements. The place of payment was not stated in the note. The provisions of the Moneylenders Ordinance of the Straits Settlements did not appear to have been complied with. The trial Magistrate being in doubt as to the law to be applied, referred the matter to the Court of a Judge under Section 571 of the Civil Procedure Code (Cap. 7).

**Held,** that (1) if the promissory note was made in the Federated Malay States then the suit lies and the Plaintiff will succeed unless the defendant proves either payment of the amount or lack of consideration.

(2) If the promissory note was made in the Straits Settlements and is payable in the Federated Malay States, then again the plaintiff can sue on the promissory note and recover. Section 72 of Cap. 56 is no bar as the promissory note (as a promissory note) is valid as regards form by the law of the place of issue (it is also valid in form by the law of the Federated Malay States).

(3) If the promissory note was made in the Straits Settlements and is also payable in the Straits Settlements then the proper law of the contract is the Straits Settlements law and the plaintiff cannot recover unless he could recover under the Straits Settlements law.

The learned Judge remitted the case back to the Magistrate's Court for determination on evidence of the question of fact whether the promissory note was executed in the Straits Settlements or in the Federated Malay States.

Cases referred to:—

(1) *Re Marseilles Extension Rail, & Land Co., Smallpage's & Brandon's Case,* (1885) 30 Ch. D. 598.

(2) *Shirchand & Co., Lacon,* (1906) 22 T.L.R. 245.

(3) *Velchand v. Manners,* (1909) 25 T.L.R. 329.

(4) *Wyane v. Jackson,* (1826) 2 Russ. 351.

REFERENCE under Section 571 of the Civil Procedure Code.

*Bannerjee* for the plaintiff made the following submissions:—

In this case the promissory note was admittedly executed within that portion of the Town of Tampin, situated within the border of the Straits Settlements, but the place of payment was not stated in the note or probably never agreed upon by the parties. At least the Learned Magistrate who "stated the case" had not determined on evidence in one way or the other.

A Promissory note is a contract of loan. In case of contracts made abroad and sought to be enforced in another place, the intention of the parties as to the place of performance has a very important bearing on the decision of the issue; as the validity of such contract is (subject to certain exceptions) governed by the "Proper Law of contract." According to Dicey in his "Conflict of Laws" (Third Edition) page 572, "Proper Law" of contract means the law or laws by which the parties to the contract intended, or may fairly be presumed to have intended, the contract to be governed or (in other words) the law or laws to which the parties intended or may fairly presume to have intended, to submit themselves.

The Court is called upon to select the law by which the rights of the parties is governed and in order to do so the Court will have to inquire as to what was the intention of the parties as to the law by which they intended to be governed. In the absence of express stipulation as to the intention according to Dicey in the same volume at pages 604 and 605 "an inquiry as to the intention of the parties is really an inquiry not into the actual intention of the parties for it possibly never had any real existence, but into the intention which would have been formed by sensible persons in the position of parties if their intention had been directed to contingencies which escaped their notice." In the present case the form of the promissory note was not drawn according to the provisions of the Moneylenders Ordinance of the Colony but in the usual form prevalent in Federated Malay States, it was stamped in the Federated Malay States where the Defendant lived, which suggest conclusions, that the contract was intended to be performed and enforced in the Federated Malay States.

Moneylenders Act of the place where a contract of loan was made does not apply to a contract intended to be performed abroad. See *Shirchand & Co., v. Lacon*[2], followed *Velchand vs. Manners*[3]. Non-compliance with the provisions of the Moneylenders Act merely makes the contract unenforceable and it does not make the contract illegal or unlawful, therefore it does not come within the exception in cases of a contract which whether lawful by its proper law or not is invalid if the making thereof is unlawful by the law of the Country where it is made.

Secondly the Bill of Exchange Act, recognises to a certain extent the distinction of foreign and inland instruments and according to Section 72 (i) (b) Enact-

ment 6 of 1934, "where a bill issued out of the Federated Malay States conforms, as regard requisites in form, to the law of the Federated Malay States, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold or become parties to it in the Federated Malay States." According to Halsbury's Laws of England Volume 2 Hailsham Edition) page 719, where the instrument conforms as regards requisites in form to the law of this Country it may for the purpose of enforcing payment thereof be treated as valid as between all persons who negotiate, hold or become parties to it in that Country *Re Marseilles Extension Rail, and Land Co., Smallpage's and Brandon's cases*[1]. An instrument issued abroad is not invalid in this Country by reason only that it is not stamped in accordance with the law of the place of issue *Wyane v. Jackson* [4].

Defendant unrepresented.

*Cur. Ad. Vult.*

**Cussen, J.**—This is a reference under section 571 of the Civil Procedure Code (Cap. 7) for decision by the Court of a Judge of a question of law arising in the hearing of Tampin Civil Suit No. 10 of 1939 in the Court of the Magistrate, Tampin.

The facts are set out in the "Statement of the facts of the case."

At the hearing of the reference before this Court Mr. Bannerjee appeared for the Plaintiff; the Defendant did not appear.

The contravention of the Moneylenders Ordinance, Straits Settlements, section 11 (ii) was that which came to the notice of the Magistrate, but in the hearing before me it was discovered and admitted by Mr. Bannerjee that there had also been a failure to comply with the provisions of section 4 of that ordinance in so far as that no "note or memorandum in writing of the contract was signed by the parties to the contract." The promissory note if signed by both parties would be such a note or memorandum but it is not signed by the Plaintiff; only by the Defendant. Also no authenticated copy of the promissory note was supplied to the Defendant.

Mr. Bannerjee relied upon two arguments:—

(1) that the Plaintiff was a holder of the promissory note in the Federated Malay States within the meaning of section 72 (i) (b) of the Bills of Exchange Enactment (Cap. 56); and

(2) that the proper law of this contract is the law of the Federated Malay States and not that of the Straits Settlements.

He submits that it was the intention of the two parties at the time of the contract of loan that the place of performance was to be in the Federated Malay States and that the enforcement of the contract was also to be in the Federated Malay States.

What the intention of the parties was as to the place of payment of the loan is a question of fact, and so must be determined on evidence by the Lower Court. On a reference under section 571 of the Civil Procedure Code this Court can only decide questions of law on the statement of facts submitted.

Mr. Bannerjee stated various arguments to show that the correct finding of that fact should be as he contends. He will doubtless renew these before the Magistrate when the Lower Court proceeds with the hearing of the Civil Suit following on the directions I will now give on the questions of law involved.

My judgment on these questions is:—

(a) If the promissory note was made in the Federated Malay States then the suit lies and the Plaintiff will succeed unless the Defendant proves either payment of the amount or lack of consideration.

(b) If the promissory note was made in the Straits Settlements and is payable in the Federated Malay States, then again the Plaintiff can sue on the promissory note and recover. Section 72 of Cap. 56 is no bar as the promissory note (as a promissory note) is valid as regards form by the law of the place of issue (it is also valid in form by Federated Malay States law).

(c) If the promissory note was made in the Straits Settlements and is also payable in the Straits Settlements then the proper law of the contract is the Straits Settlements law and the Plaintiff cannot recover unless he could recover under Straits Settlements law.

It is in this case open to the Defendant to show that the provisions of section 4 (or section 11 or any other section) of the Moneylenders Ordinance were not complied with in so far as there was no note or memorandum in writing of the contract, signed by the parties.

The lower Court should first determine on evidence the question of fact whether the promissory note was executed in the Straits Settlements or in the Federated Malay States. If the execution was in the Federated Malay States then ruling (a) above applies. If the execution of the promissory note was in the Straits Settlements then the Magistrate must determine the further question of fact as to where it was payable. This, where not expressed, is a question of fact as to the intention of the parties to be deduced from a consideration of the relevant evidence. Then according to the finding of this fact either (b) or (c) above is to be applied.

*Order accordingly.*

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[APPELLATE CIVIL JURISDICTION]
MURRAY-AYNSLEY, J.
July 31, 1939.

## PHEE CHUNG SAN v. LIM GIOK.

[PERAK CIVIL APPEAL No. 14 of 1939]

*Labour Code (Cap. 154) S. 54(i)—"domestic servant".*

A cook in the employ of a kongsi is a "domestic servant" within the meaning of section 54 (i) of the Labour Code and as such is entitled to 14 days' notice of intention to terminate his employment.

APPEAL to the Supreme Court from the decision of the Protector of Chinese, Ipoh, in Ipoh Labour Case No. 124 of 1938.

*K. C. Chan,* for Appellant.

*Respondent,* unrepresented.

**Murray-Aynsley, J.**—The only point in this appeal that calls for comment is the question whether the Respondent is a "domestic servant" for the purposes of Section 54(i) of the Labour Code.

There is a partial definition of "domestic servant" in Section 2 of the Code in the form "domestic servant"

> "includes....and other house, stable or garden servants employed in or in connection with, the domestic services of any public or private dwelling-house or eating-house".

This includes certain persons who would not be included in the classification according to English Law, but in the case of those who are employed in services strictly domestic the position appears to be the same as in England in that persons performing these services are domestic servants although they are not working in a private household but in a hotel, club, or restaurant.

The Respondent in this case is a cook in a kongsi. There is not much in the evidence to explain the nature of this particular kongsi, but I consider that the Respondent is a domestic servant and only entitled to 14 days notice. The amount awarded by the Controller is therefore reduced by $8.00.

No order as to costs.

*Appeal allowed.*

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[ORIGINAL CIVIL JURISDICTION]
MURRAY-AYNSLEY, J.
October 2, 1939.

## PHAN KIN THIN v. PHAN KUON YUNG.

[PERAK ORIGINATING SUMMONS No. 246 of 1939]

*Will—construction—bequest for "Chin Shong" (ancestral worship)—validity.*

A bequest for "Chin Shong" (ancestral worship) is a good gift provided that it is so drawn that infringement of the rule against perpetuities is avoided.

**Re Yap Kwan Seng,** 4 F.M.S.L.R. 313 referred to and considered.

ORIGINATING SUMMONS.

The principal question propounded before the Court was, whether a gift of shares of a Chinese testator's estate for his father's *Chin Shong* was a good bequest.

Cases referred to:—

(1) *Low Cheng Soon & Others v. Low Chin Piow & Another,* 1 M.L.J. 15.

(2) *Bourne v. Keane,* 1919 A.C. 815.

(3) *Re Yap Kwan Seng,* 4 F.M.S.L.R. 313.

(4) *Yeap Cheah Neo v. Ong Cheng Neo,* L.R. 6 P.C. 382.

(5) *Choa Choon Neoh v. Spottiswoode,* 1 Kyshe 216.

(6) *West v. Shuttleworth,* 2 M. & K. 684.

*Mervyn Farr* for the applicant. The will took effect as from the date of the death of deceased, which was the 29th January 1929.

On the 29th January 1929, the Perak Order in Council was in full force and effect, and Chinese law and custom was recognised in the F.M.S. (vide Recognition of Chinese Laws Order in Council No. 23/1893 *Voules* Volume 1 page 610).

This Order was repeated by Enactment No. 12/1929, known as The Distribution Enactment 1929, in August 1929.